

**LOWER PROVIDENCE TOWNSHIP**  
**MONTGOMERY COUNTY, PENNSYLVANIA**

**RESOLUTION No. 2024-16**

**WHEREAS, Nagib Albadani** (hereinafter referred to as “Applicant”) has submitted a request for conditional use approval related to property located at 2601 Egypt Road, Eagleville, Lower Providence Township, further identified as Tax Map Parcel Number 43-00-11986-00-4 (the “Property”); and

**WHEREAS,** the Property is located within the GC – General Commercial Zoning District;  
and

**WHEREAS,** the Lower Providence Zoning Ordinance (“Ordinance”) permits various uses by conditional use; and

**WHEREAS,** Applicant has submitted a request for conditional use approval to permit multiple uses at the Property pursuant to §§143-92 and 143-100, which likewise requires compliance with §143-260.A of the Ordinance, which allows more than one permitted and/or conditional uses on the property subject to the standards set forth in §143-113.A-D; and

**WHEREAS,** Township staff and the Township Engineer have reviewed the Application;  
and

**WHEREAS,** the Board of Supervisors of Lower Providence Township (hereinafter referred to as “Board”) is prepared to DENY approval of Applicant’s request for conditional use approval, for the reasons set forth herein; and

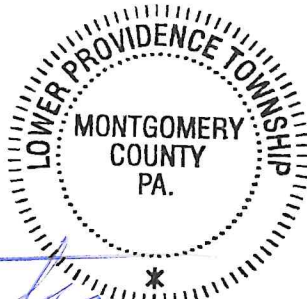
**WHEREAS,** the Board is prepared to authorize the Board Chair and the Township Manager to execute the written decision of the Township, pursuant to Section 913.2(b)(1) of the Pennsylvania Municipalities Planning Code which is set forth as Exhibit “A” hereto.

**NOW, THEREFORE, BE IT HEREBY RESOLVED**, by the Board of Supervisors of Lower Providence Township this 21<sup>st</sup> day of March, 2024, that said request for conditional use approval is DENIED, for the reasons set forth in the Findings of Fact and Conclusions of law, attached hereto as Exhibit “A” and incorporated herein.

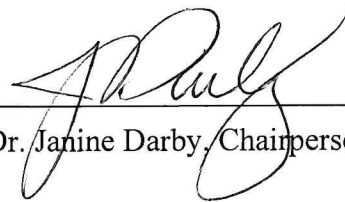
**RESOLVED** and **APPROVED** this 21<sup>st</sup> day of March, 2024.

ATTEST:

  
E.J. Mentry, Secretary



BOARD OF SUPERVISORS OF LOWER  
PROVIDENCE TOWNSHIP

By:   
Dr. Janine Darby, Chairperson

# Exhibit

“A”

## Findings of Fact

1. Applicant is Nagib Albadani (“Applicant”), tenant of certain real property located at 2601 Egypt Road, Eagleville, Lower Providence Township, Montgomery County, further identified as Montgomery County Tax Parcel Number 43-00-11986-00-4 (“Property”).
2. The Property is approximately 40,000 square feet, and is within the GC – General Commercial Zoning District (“GC”).
3. Permitted uses in the GC Zoning District are as set forth at §§143-91 through 97 of the Lower Providence Code of Ordinances (“Code”).
4. The dimensional standards for classifying lots within the GC Zoning District are set forth at §143-98 of the Code. Based upon the criteria established in this section, the Property is a Class One lot.
5. §143-92 of the Code provides that on any Class One lot, a combination of two or more Class One uses may be permitted by conditional use, meeting the standards of §143-100 of the Code.
6. Multiple uses are permitted by conditional use approval in the GC Zoning District, subject to the conditions set forth at §143-100 of the Code.
7. Multiple uses are permitted on a single property subject to conditional use approval pursuant to §146-260.A, which is itself subject to compliance with §146-113.A-D of the Code.
8. The Property currently contains a restaurant use.
9. Applicant proposes to add a retail smoke shop, which is classified as a retail use pursuant to the Code.
10. Both a restaurant and a retail use are permitted uses within the GC Zoning District for a Class One lot.
11. On or about December 14, 2023, Applicant submitted an application for Conditional Use approval requesting conditional use approval to add a retail smoke shop to the Property.
12. A public hearing was initially scheduled for February 1, 2024. Notice of the hearing was advertised consistent with the Municipalities Planning Code. Prior to the February 1, 2024 hearing, counsel for the Applicant requested a continuance of the hearing. Specifically, the hearing was opened at the February 1, 2024 meeting and continued to the February 15, 2024 regularly scheduled meeting of the Board of Supervisors. Counsel for the Applicant agreed to conduct the hearing February 15, 2024, with the Board of Supervisors rendering

its decision at the March 21, 2024 regularly scheduled meeting of the Board of Supervisors. The Property was posted with notice of the hearing consistent with the Municipalities Planning Code and notice of the hearing was mailed to neighboring property owners as required by the Code.

13. The following exhibits were admitted at the February 15, 2024 hearing:

- T-1 – Application
- T-2 – Proof of Publication
- T-3 – Property Posting
- T-4 – Neighbor Notification and Notification List
- A-1 – Photograph
- A-2 – Aerial Photograph

14. There was no request from any individual to take party status relative to the Application

15. The Applicant was represented at the conditional use hearing by Brendan Campbell. In support of the Application, Applicant, Nagib Albadani, testified as follows:

16. Mr. Nagib is a tenant at the Property who has entered into a 5 year lease agreement. N.T., at 5.

17. The Property currently houses a pizza restaurant. There are two buildings on the Property. The building that Applicant proposes to occupy most recently housed a Dunkin Donuts restaurant use. N.T., at 6.

18. Applicant would be renting more than half of the building. The remainder of the building was previously used as a dry cleaner and a construction office, but is currently vacant. N.T., at 7. The building has a drive through, but Applicant does not intend to use that. Applicant would add signage to the building for the business, but it would be replacing existing signage. N.T., at 11-12.

19. Applicant proposes to operate a smoke shop to sell cigarettes, vapes, loose tobacco, pipes, cigars and other related products. N.T., at 8-9.

20. Applicant worked in a corner shop in Philadelphia previously, but has been doing construction work for the past year. N.T., at 9.

21. The Property is at the corner of Egypt Road and Trooper Road. It has six marked parking spots, including one handicapped spot, with additional parking in the back of the building. The Property is accessed from either Trooper or Egypt Road. N.T., at 9-11. Applicant believes he has access to two parking spots in the back of the building. N.T., at 17.

22. Hours of operation would be 8:00 a.m. to 10:00 p.m. N.T., at 13.

23. Applicant has not yet done any work to the interior of the building. He plans to maintain the existing bathroom. N.T., at 13-14.
24. Applicant has not conducted a traffic impact study. N.T., at 19.
25. Applicant did not provide a traffic study or traffic impact analysis.
26. The Board of Supervisors found the testimony of Applicant to be credible based upon their demeanor.

## CONCLUSIONS OF LAW

1. Applicant seeks conditional use approval to add a retail smoke shop to the Property where an existing restaurant use is present pursuant to §§143-92 and 143-100. As outlined above, Applicant must also demonstrate compliance with 146-260.A, which is itself subject to compliance with §146-113.A-D of the Code.
2. Legal Authority

"A conditional use is nothing more than a special exception which falls within the jurisdiction of the municipal governing body rather than the zoning hearing board." Williams Holding Group, LLC v. Bd. of Supervisors of W. Hanover Twp., 101 A.3d 1202 (Pa.Cmwlt 2014).

Pennsylvania law is well settled with respect to the burden of proof that the Board of Supervisors must apply when addressing conditional use applications. Northampton Area School District v. E. Allen Township Bd. Of Supervisors, 824 A.2d 372 (Pa. Cmwlt. 2003). The initial burdens of production and persuasion are placed upon the applicant to demonstrate that he or she meets all of the specific objective requirements for the conditional use as set forth in the zoning ordinance. In re Land Use Appeal of Gresko, 2009 Pa. Dist. & Cnty. Dec. LEXIS 419 (citing Appeal of George Baker, Jr., 19 Pa. Commw. 163, 339 A.2d 131 (Pa. Cmwlt. 1975)). The Commonwealth Court has explained that "[a]n applicant who satisfies this prima facie burden is entitled to approval..." Williams Holding Group, LLC v. Bd. of Supervisors of W. Hanover Twp., 101 A.3d 1202 (Pa.Cmwlt. 2014). However, failure to sustain this burden of proof constitutes substantial evidence to reject or deny an application for conditional use approval. In re AMA/American Marketing Ass'n, Inc., 2016 WL 3258103 (Pa.Cmwlt. 2016).

In considering a conditional use application, a local governing body is free to reject even uncontradicted testimony if it finds it lacking in credibility, including testimony offered by an expert witness. Taliaferro v. Darby Twp. Zoning Hearing Bd., 873 A.2d 807 (Pa.Cmwlt.2005).

An applicant for special exception or conditional use must demonstrate that his proposed use meets the applicable requirements of the zoning ordinance when the application is submitted. "An applicant is entitled to a conditional use as a matter of right, unless the governing body

determines that the use does not satisfy the specific, objective criteria in the zoning ordinance for that conditional use. The applicant bears the initial burden of showing that the proposed conditional use satisfies the objective standards set forth in the zoning ordinance, and a proposed use that does so is presumptively deemed to be consistent with the health, safety and welfare of the community. Once the applicant satisfies these specific standards, the burden shifts to the objectors to prove that the impact of the proposed use is such that it would violate the other general requirements for land use that are set forth in the zoning ordinance, i.e., that the proposed use would be injurious to the public health, safety and welfare.” EQT Production Company v. Borough of Jefferson Hills, 652 Pa. 508 (2019).

Further, a promise to comply or conditions compelling future compliance cannot cure an otherwise noncompliant application. The Commonwealth Court has rejected arguments that assurances of future compliance should be sufficient, stating “[i]f we were to adopt a rule that to obtain a special exception all that would be required is for an applicant to promise to come into compliance at some future date, it would make the approval process meaningless because once an applicant promises it would be entitled to receive the special exception.” In re Thompson, 896 A.2d 659, 680 (Pa.Cmwlth.2006) (emphasis supplied) (citations omitted).

### 3. Objective Ordinance Criteria.

The objective criteria for conditional use approval are set forth at §143-80.E(2)(b), as follows:

“[1] That the propose use is appropriate to the tract in question and will not adversely effect the character of the surrounding land uses and general neighborhood.

[2] That the proposed use provides for adequate access to public roads without creating hazardous conditions at intersections or areas of poor road alignment and without creating undue congestion. All applications shall be accompanied by a traffic impact analysis which meets the requirements of the Township's Subdivision and Land Development Ordinance, as last amended.

[3] That the proposed use conforms to all applicable requirements of this article.

[4] That the proposed use's water supply and sanitation systems are adequate and able to prevent disease, contamination and unsanitary conditions. Where applicable, a certificate of adequacy of sewage and water facilities shall be provided.

[5] That the proposed use will result in an appropriate use of land, the conservation of the value of buildings, safety from fire, panic and other dangers, adequacy of light and air, the prevention of overcrowding of land and congestion of population and the adequacy of public and community services.”

Applicant did not submit a traffic impact analysis, as required by the objective ordinance

criteria. As noted above, a promise to comply in the future, had one been offered, is insufficient to sustain the burden of proof. The Board of Supervisors finds Applicant's self-serving statement that the traffic impact will be minimal not credible or persuasive. Applicant's application is, therefore, insufficient and fails to satisfy the objective criteria of the ordinance. The Board denied the Application in its entirety on this basis.

Applicant also failed to address the access to public roads, specifically with respect to any potential hazardous conditions at intersections or areas of poor road alignment. The Property is located at a heavily traveled intersection. Upon questioning by the Board, the Applicant simply offered the self-serving statement that traffic would not be an issue. There was no testimony or evidence offered regarding the impact of the use on the intersection. The Board denied the Application in its entirety on this basis.

Applicant also failed to address the remaining objective criteria of the ordinance in any respect. The Board denied the Application in its entirety on this basis.

In addition, the Board found that the Applicant failed to sustain his burden of proof in other, more specific ways, as discussed *infra*.

#### 4. Applicant's Requests for Relief

As noted above, Applicant's Application requires demonstration of compliance with several sections of the Code. Each is addressed in turn.

##### A. §143-100

Applicant seeks to add an additional use to the Property. Multiple Class One uses are permitted on a Class One lot pursuant to §143-92, subject to compliance with §143-100. This section mandates compliance with the following:

"A. All uses, whether in a single building or in several buildings, shall be designed according to a unified architectural scheme, including treatment of building facades, signs, lighting, landscaping and circulation.

B. A maximum of two curb cuts for vehicular access shall be permitted for the entire development, unless traffic safety considerations require an alternate arrangement, based on the evaluation and recommendation of the Township Engineer.

C. Parking for each use shall meet the requirements of Article XII, Off-Street Parking Standards. The shared parking concept may be utilized where applicable.

D. Signs shall be erected and installed in conformance with Article XIX of this chapter.

E. Any combination of uses on a lot that would generate more than 100 vehicular trips per peak hour according to the latest ITE trip generation standards will require a traffic impact analysis, as per the requirements of § 143-101E of this article.



F. The development shall comply with all other requirements of this article, including general regulations, dimensional standards and coverage requirements.”

Here, Applicant failed to address subsections A, E and F in their entirety. With regard to subsection B, Applicant testified regarding the two existing curb cuts, and does not propose any additional curb cuts. Applicant has satisfied this section of the Ordinance. Applicant did offer testimony regarding subsections C and D. Specifically, Applicant testified that there are 6 spaces dedicated to his proposed use, including one handicapped spot. Applicant failed, however, to provide any evidence regarding the available parking spaces or requirements for the other use on the Property, so the Board of Supervisors is unable to determine whether Applicant complies with subsection C. With regard to subsection D, Applicant testified that signage will be added to replace existing signage. It is unclear whether the signage will be in conformity with the requirements of subsection D.

Therefore, the Board of Supervisors found that Applicant failed to demonstrate compliance with §143-100 at subsections A, C, D, E and F, and denied the Application in its entirety on this basis.

*B. §143-260.A and 143-113<sup>1</sup> – More Than One Use*

Applicant seeks to maintain more than one use on the Property; namely, a retail smoke shop in addition to an existing restaurant use. These uses are permitted uses when they are the sole use on a property, but the combination of uses requires compliance with the referenced sections. Applicant likewise failed to sustain the burden of proof that he is entitled to conditional use approval for more than one use on the Property.

§143-260.A allows a combination of one or more permitted and/or conditional uses by conditional use approval, subject to compliance with the standards set forth at §143-113A-D. These standards include that all uses be designed according to a unified architectural scheme, including treatment of building facades, lighting, signage, landscaping and circulation. Code, at §143-113.A. Here, Applicant proposes two separate and distinct uses and buildings, and it is unclear whether there will be a unified architectural scheme. Therefore, Applicant failed to demonstrate compliance with the requirements of the Code.

In addition, as set forth above, Applicant failed to satisfy the objective criteria of the Code found at §143-80 with respect to this Application. Further, Applicant’s failure to demonstrate compliance with §143-113.A fails to satisfy the provisions of §143-(80), which requires Applicant to demonstrate compliance with all requirements of the Code.

The Board therefore denied the conditional use application with respect to the request to allow multiple uses on the Property.

## 5. Conclusion

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<sup>1</sup> The proposed multiple uses is subject to compliance with the ordinance criteria set forth at §143-113 as well as the criteria found at §143-80.A-D.

As noted above, the initial burdens of production and persuasion are placed upon the applicant to demonstrate that he or she meets all of the specific objective requirements for the conditional use as set forth in the zoning ordinance. In re Land Use Appeal of Gresko, 2009 Pa. Dist. & Cnty. Dec. LEXIS 419 (citing Appeal of George Baker, Jr., 19 Pa. Commw. 163, 339 A.2d 131 (Pa. Cmwlth. 1975)). For the reasons set forth above in more particular detail, the Board of Supervisors also found that Applicant failed to sustain his burden of proof for the conditional use application with respect to the objective criteria found in the Lower Providence Township Code of Ordinances.

The Board of Supervisors therefore voted unanimously to deny the conditional use application in its entirety.